A

SUNTHARARAJU PACHAYAPPAN

v.

JABATAN KASTAM DIRAJA MALAYSIA

B

HIGH COURT MALAYA, ALOR SETAR
MOHD SOFIAN ABD RAZAK J
[ORIGINATING SUMMONS NO: 24-1630-2008]
10 DECEMBER 2009

C ***CRIMINAL PROCEDURE:*** *Customs investigation - Seizure of buffaloes and motor lorry - Claim for return - Duty of Customs Department - Director General of Customs to decide whether to release seized goods or refer matter to Magistrate within one month from date of receipt of claimant's notice - Failure to comply with s. 128 Customs Act 1967 -*
D *Detention unlawful*

CUSTOMS AND EXCISE: *Seizure - Seizure of buffaloes and motor lorry - Claim for return - Duty of Customs Department - Director General of Customs to decide whether to release seized goods or refer matter to*
E *magistrate within one month from date of receipt of claimant's notice - Failure to comply with s. 128 Customs Act 1967 - Detention unlawful*

CUSTOMS AND EXCISE: *Seizure - Seizure made by police officers - Seized items later handed over to Customs - Whether provisions of Customs Act 1967 applicable*

F

POLICE: *Powers - Seizure of property - Seizure made by police officers - Seized items later handed over to Customs - Whether provisions of Customs Act 1967 applicable*

G The plaintiff and two (2) other persons were arrested by police officers together with nine (9) buffaloes which were loaded on the plaintiff's motor-lorry ('seized goods'). The arrest took place about 300 meters from the Malaysian-Thai border. The nine buffaloes were later handed over to the defendant. The plaintiff averred that the
H nine buffaloes were not purchased from Thailand but were bought in Kedah. The plaintiff was subsequently served with a Notice of Seizure and he was informed that he was suspected of committing offence(s) under ss. 133(1)(e)/135(1)(e) of the Customs Act 1967 ('said Act'). The plaintiff after receiving the said notice, had
I submitted 2 Statutory Declarations to the defendant and made a claim for the return of the seized goods. Having received the plaintiff's claim, the defendant however did not take any step to

refer the matter to the court. The plaintiff filed this action claiming for declarations that the Notice of Seizure was null and void and *ultra vires* the provisions of the said Act. The plaintiff also claimed that the seizure of nine buffaloes and the motor-lorry was illegal.

Held (allowing the plaintiff's application with costs):

(1) The defendant's argument that since the seizure of the said goods initially was made by police officers and later handed over to the defendant therefore the said Act was not applicable – was a simplistic argument. Under s. 8 of the said Act it is clearly defined that all police officers below the rank of Inspector shall have and may exercise all the powers of officers of customs, while s. 114(1) thereof stipulates that seizure of the goods may be made by any officers of customs. (para 10)

(2) The defendant had failed to comply with the provisions of s. 128(3) of the Act in that the Director General of Customs had (but failed) to make a decision whether to release the seized goods or direct such senior officer of customs to refer the matter to the Magistrate for his decision. As it were, the decision to refer the matter to the Magistrate must be made within one (1) calendar month from the date of receipt of the claimant's notice to claim the goods. (para 23)

Case(s) referred to:
Soong Chee Kong v. PP and Ng Soon Sum & Anor v. PP [1950] 1 LNS 84 ***(refd)***

Legislation referred to:
Customs Act 1967, ss. 8, 114(1), (3), 128(1), (2), (3), (4), 133(1)(e), 135(1)(e)
Federal Constitution, art. 13(1)

For the plaintiff - Harpal Singh; M/s Harpal Singh & Co
For the defendant - Gan Peng Kun; SFC

Reported by Amutha Suppayah

JUDGMENT

Mohd Sofian Abd Razak J:

[1] The simple and brief facts of this application by way of originating summons (enclosure) by the plaintiff as narrated are that at about 5.30pm on 5 September 2008, the plaintiff and two

(2) other persons had been arrested by police officers, together with nine (9) buffaloes which were loaded on a motor-lorry model Mitsubishi Canter with registration number KAS 1565 belonging to the plaintiff (hereinafter called the 'seized goods') The arrest took place about 300 meters from the Malaysian-Thai border.

[2] The nine (9) buffaloes were later handed over to the Kedah State Veterinary Services Department, Alor Setar and thereafter handed over to the defendant. The plaintiff and the two (2) other persons were released on bail of RM2,000 each. The plaintiff averred that the nine (9) buffaloes were not purchased from Thailand but were bought at a price of RM1,600 each from one Maziki bin Ismail through an agent named Mohamad Aminuddin bin Ismail both of whom are Malaysian citizens. The plaintiff further averred that the purchase took place at Padang Sanai, Kuala Nerang, Kedah. The plaintiff was subsequently issued and served with a notice of seizure dated 6 September 2008 (hereinafter called the 'said notice') and he was informed that he was suspected of committing offence(s) under ss. 133(1)(e)/135(1)(e) of the Customs Act 1967 (hereinafter called the 'said Act'). The plaintiff was never charged for any offence(s) up till now. The plaintiff after receiving the said notice, had submitted two Statutory Declarations to the defendant and made claims for the return of the seized goods. This claim of the plaintiff was denied by the defendant but nevertheless he admitted receiving the plaintiff's claim. Having received the plaintiff's claim within the 30 days the defendant never took the step(s) to refer this matter to the court.

The Plaintiff's Application (encl. 1)

[3] Prays for the following reliefs namely:

a) Declaration that the Forfeiture Notice dated 6 September 2008 by the defendant is null and void and of no legal consequences and ought to be set aside;

b) That the said notice was *ultra vires* the provisions of the Customs Act 1967;

c) That the seizure of nine (9) buffaloes and the motor-lorry KAS 1565 was illegal in the given circumstances;

d) costs; and

e) any other order.

Plaintiff's Submission

[4] The learned counsel for the plaintiff submitted that in such a situation as this, the said Act does not apply as the incident took place within the territorial jurisdiction of Malaysia and the defendant had given no proof to rebut the allegations of the plaintiff that the nine (9) buffaloes were bought locally. It was further submitted that if the nine (9) buffaloes were bought in Malaysia from Malaysians, therefore the said Act does not apply and the defendant's issuance of the forfeiture notice is *ultra vires* the provisions of the said Act and having no legal consequences. Alternatively, even if the said Act does apply, it is the plaintiff's contention that no offences were committed in the face of the two Statutory Declarations by one Maziki bin Ismail and Mohamad Aminuddin bin Ismail respectively submitted by the plaintiff to the defendant (hereinafter called the 'said SD'). In concluding his submission, the learned counsel avers that the fact that there is no prosecution against the plaintiff for any offence under the said Act, is in itself evidence that the seizure was made without reasonable or probable cause and contravenes art. 13(1) of the Federal Constitution that 'No person shall be deprived of property save in accordance with law'.

Defendant's Submission

[5] The learned Senior Federal Counsel (hereinafter called 'learned SFC') for the defendant conceded that the seized goods were first detained by police officers and later handed over to the defendant. By virtue of s. 8 of the said Act, all police officers below the rank of Inspector shall have and may exercise all the powers of customs. Under s. 114(1) of the said Act, the seizure of the goods may be made by any officer of customs and since there was no notice issued by the police officer, it is incumbent upon the defendant to issue the notice under s. 114(3) of the Act once the goods seized were handed to the defendant. It is further submitted that the issue as to whether the notice of seizure is valid and whether the notice was made outside the power of the defendant does not arise at all in the present case as the seizure of the seized goods and the issuance of the notice of seizure were done according to the provisions of the said Act.

[6] The learned SFC further argued that there is no issue that the detention of the seize goods was unlawful. In para 9 of the affidavit affirmed by PiKK(P) Rosmawati binti Mustafa that there

was reasonable ground to seize the said goods as investigations revealed that an offence under s. 133(1)(e) and s. 135(1)(e) of the Act was suspected to have been committed. As such the seized goods could not be returned to the plaintiff as he had not complied with s. 128(2) of the Act which provides that any person asserting that he is the owner of the goods may give written notice to a senior officer of customs, claiming that the goods are not liable to forfeiture within one (1) calendar month from the date of seizure.

[7] It is further submitted that the said SD do not amount to claim of ownership as described under s. 128(2) of the Act. The contents of the said SD do not show that both persons who made the said SD are claiming any ownership to the seized goods. The plaintiff had also failed to exhibit any document in the affidavit affirmed by him to show that he did submit any form of ownership to the seized goods within one (1) calendar month from the date of the notice of seizure. In the absence of such claim of ownership as described in s. 128(2) of the Act, the goods could not be returned to the plaintiff as the goods are deemed to be forfeited after the expiry of one (1) calendar month from the date of the notice of seizure under s. 128(1) of the Act.

[8] The nine (9) buffaloes according to the defendant, were suspected of having been imported into Malaysia from Thailand in contravention to s. 133(1)(e) and s. 135(1)(e) of the Act. The provisions of the said Act referred to in s. 135(1)(e) of the Act, for the purposes in the present case, is Customs (Prohibition of Imports) Order 2008. Under Part 1 Fourth Schedule of the Order, the importation of domestic animals (which, in the present case, is the buffaloes) must be accompanied by an import permit issued by or on behalf of the Director General of Veterinary Services. The plaintiff did not produce any such import permit when he was arrested by the police officers. By the failure on the part of the plaintiff, it was submitted that the two (2) elements under s. 135(1)(e) of the Act which is (a) knowingly concerned in conveying and (b) intention to defraud the Government has been proven by the defendant and the seizure of the said goods is lawful and in accordance with the provisions of the said Act.

[9] On 1 October 2009, the court after perusing encl. 1 together with the affidavits filed herein and after reading written and hearing oral submissions by both parties, allowed the plaintiff's application with costs. The defendant who is dissatisfied with the said decision has since filed a notice of appeal.

The Findings Of The Court

[10] My first reaction to the argument that since the seizure of the said goods initially were made by police officers and later handed over to the defendant therefore the said Act is not applicable, is a simplistic view. Why I say so is because no reference probably is made to s. 8 of the said Act where it is clearly defined that all police officers below the rank of Inspector shall have and may exercise all the powers of officers of customs. In this respect, I disagree with the view expressed by learned counsel for the plaintiff that the said Act does not apply. Of course s. 114(1) of the said Act does stipulates that seizure of the goods may be made by any officers of customs. The issue which begs the court's determination here is after the seizure of the said goods by the defendant for an alleged offence committed under s. 133(1)(e) and s. 135(1)(e) of the Act what is the next procedure to be adopted by the defendant. The stance adopted by the defendant is that the said goods seized contravenes s. 133(1)(e) and s. 135(1)(e)of the Act respectively.

[11] At this juncture it would be appropriate to state the two (2) sections respectively for easier reference namely:

PART XIV

Penalty on making incorrect declarations and on falsifying documents

133(1) Whoever:

(e) being required by this Act to make a declaration of dutiable goods imported or exported, failed to make such declaration as required;

Penalty for various smuggling offences

135(1) Whoever:

(e) is in any way knowingly concerned in conveying, removing, depositing or dealing with any dutiable, uncustomed or prohibited goods with intent to defraud the Government of any duties thereon, or to evade any of the provisions of this Act or to evade any probation applicable to such goods;

[12] It is observed that soon after the seizure of the said goods by the defendant on 5 September 2008 pursuant to s. 114(1) of the Act, the plaintiff was served with a notice of seizure dated 6 September 2008 pursuant to s. 114(3) of the Act which is reproduced in *verbatim* herein for reference.

Jabatan Kastam Diraja Malaysia
Bahagian Pencegahan
Kompleks Kastam
Persiaran Sultan Abd. Hamid — Tel : 04-7551212
Alor Star, Kedah — Fax : 04-7551329

Ruj. Kami : KE.KB(&()778/2008-70
Tarikh : 06hb. September, 2008

Sunthararaju a/l Pachayappan
(No K/P: 610617-02-5821)
No. 92, Lorong Putih 3,
Taman Tanjung Puteri
09300 Kuala Ketil
Kedah Darul Aman

Notis Penyitaan

Dengan menjalankan kuasa-kuasa yang diberi dibawah Seksyen 114 Akta Kastam 1967, saya Rosmawati binti Mustafa, Pegawai Kastam Kanan, Bahagian Pencegahan, Kastam Diraja Malaysia, Kedah dengan ini memberi notis kepada tuan bahawa pada 05.09.2008 lebih kurang jam 5.30 petang di alamat Sempadan Durian Burung, Jalan Durian Burung, Padang Sanai, Kuala Nerang, Kedah telah menyita barang-barang berikut:

(i) 9 ekor kerbau

(ii) Sebuah motolori jenis Mitsubishi CANTER No. KAS 1565

2. Barang-barang tersebut disita kerana ada sebab-sebab yang munasabah untuk mengesyaki bahawa kesalahan telah dilakukan di bawah *Seksyen 133(1)(e)/135(1)(e) Akta Kastam 1967.

3. Menurut Seksyen 126 Akta Kastam 1967, semua barang yang boleh dikenakan sitaan, boleh dikenakan lucut hak.

4. Sebarang tuntutan hendaklah dikemukakan secara bertulis dalam tempoh satu bulan dari tarikh penerimaan notis ini.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

(Rosmawati binti Mustafa)
Bahagian Pencegahan
b.p. Pengarah Kastam Negeri
Kedah.

[13] It is pertinent to note that in the said notice of seizure it is stated that 'Sebarang tuntutan hendaklah dikemukakan secara bertulis dalam tempoh satu (1) bulan dari tarikh penerimaan notis ini.'

[14] The plaintiff in his affidavit in support of encl. 1 had stated that he had enclosed the two (2) SD of Maziki bin Ismail and Mohamad Aminuddin bin Ismail marked as exh. 'SP2' respectively affirmed on 21 September 2008. The contents of both the SD *inter alia* states that as for Maziki bin Ismail stated that on 5 September 2008 as the owner of the nine (9) buffaloes had sold the nine (9) buffaloes through an agent named Mohamad Aminuddin bin Ismail to Suntharaju a/l Pachayappan (plaintiff) at a price of RM1,600 each at Padang Sanai, Kuala Nerang. That the nine (9) buffaloes are from Malaysia and not Thailand. In respect of the SD by Mohamad Aminuddin bin Ismail, he confirmed that on 5 September 2008 Suntharaju a/l Pachayappan had purchased nine (9) buffaloes at a price of RM1,600 each from one Maziki bin Ismail and stated that the purchase took place within Malaysian territory.

[15] The court has had the opportunity of perusing the affidavit in reply of one PiKK (P) Rosmawati bin Mustafa, a senior officer of customs affirmed on 26 February, 2009 in particular at para 8 of the said affidavit where she stated that under s. 128 of the said Act, claims on the said goods seized must be made within one (1) calendar month from the date of the of the notice of seizure. In the instant case she averred that no claim was made by any party and the investigation was still being conducted and whether the plaintiff would charge will depend on the outcome of the investigation. The investigation was still being carried out as at 5 July 2009.

[16] The learned counsel for the plaintiff in rebuttal stated that as at 25 September 2009 the plaintiff had sent a notice in writing claiming ownership to the seized goods. The said notice was sent by the plaintiff's solicitor and received by an officer of customs, one Abdul Malik bin Awang Kechik. Together with the said notice of claimant, the plaintiff also enclosed the two (2) SD dated 21 September 2008 and the registration card for the motor-lorry KAS 1565.

[17] By an affidavit in reply of Abdul Malik bin Awang Kechik, affirmed on 17 August 2009, the deponent stated at para 6 that he confirmed receiving and signing the acknowledgement of the said document marked as SP1 and the two SD and the registration card of motor-lorry KAS 1565. The deponent further stated that the said investigation was taken over by PiKK (P) Rosmawati binti Mustaffa upon his transfer to Songkhla, Thailand. On this issue, the court is of the view that the plaintiff had complied with the requirements of s. 128(1) and (2) respectively.

[18] The issue which needs to be addressed in the instant case is whether this matter could be disposed of by referring it to the magistrate for inquiry under s. 128(3) of the said Act. The learned counsel for the plaintiff did not agree, as he was of the view that the period of one (1) calendar month had expired and there the learned magistrate does not have any jurisdiction to hold an inquiry under s. 128(4) of the said Act. At this juncture the court reproduced the whole of ss. 128(1), (3) and (4) in *verbatim* for easier reference.

> **128. Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof if not claimed within one month**
>
> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph (c) of subsection (1) of section 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration:
>
> (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);
>
> (b) a written application is made for the return of such goods under paragraph (a) or (b) of subsection (1) of section 115; or
>
> (c) such goods are returned under the said paragraph (a) or (b).
>
> (2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale or the security furnished under paragraph (a) or (b) of subsection (1) of section 115, as the case may be, be released or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph (a) or (b) of subsection (1) of section 115, as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph (a) or (b) of subsection 115, as the case may be.

[19] The learned SFC further submitted that the defendant is not obligated under the law to refer the claim to the magistrate within one (1) calendar month as it is expressly provided for from the wordings of s. 128(3) of the Act. The learned SFC argued that s. 128(3) of the Act lays the procedure of what the defendant should do after the expiry of one (1) calendar month by stating as follows namely:

(a) if within one calendar month, there is a claim to the goods seized, then on the expiry of one calendar month, the Customs Department may either (i) release the goods seized to the claimant or (ii) or refer the claim to the magistrate for his decision;

(b) if within one calendar month, there is no claim to the goods seized, then on the expiry of one calendar month, the goods shall be taken and deemed to be forfeited.

To fortify his argument the learned SFC cited the case of *Soong Chee Kong and Ng Soon Sum & Anor v. PP* [1950] 1 LNS 84.

[20] In *Soong Chee Kong*'s case *(supra)* although the case did not touch on whether the decision to refer to the magistrate where there is a claim on the goods seized, shall be made within the one month period, but the case states that 'where a claim is made it must first be considered by the controller who may release the goods but cannot forfeit them. This covers cases of seizure on suspicion where circumstances are afterwards explained to the satisfaction of the controller. If he does not release, he must refer the matter to court.'

[21] In the instant case the learned counsel for the plaintiff's main thrust of his case is the failure to refer the matter to the magistrate within one (1) calendar month and did not submit on the fact whether upon receipt of the notice of claimant within one (1) calendar month refer to the Director General of Customs for his decision as to whether to release the seized goods or to direct such senior officer of customs to refer the matter to the magistrate for his decision. Be that as it may, there is no evidence before the court that the claim by the plaintiff was referred to the Director General (controller) for him to make a decision within the one calendar month (plaintiff's view) or after the expiry of the one calendar month (defendant's view) either to release the seized goods or may direct such senior officer of customs to refer the matter to the magistrate for his decision.

[22] With respect, the court cannot agree with the views expressed by the learned SFC on the interpretation of s. 128(3) of the Act. The learned SFC in his submission dealt only with the issue that the referring of the matter to the magistrate can be made after the expiry of the one (1) calendar month but did not address the point that the Director General (controller) has to make a decision first as to what to do with the plaintiff's claim. This then would be in line with decision of *Soong Chee Kong (supra)*. It was only after the plaintiff had filed this application (encl. 1) that the learned SFC had urged the court to dismiss the plaintiff's application and direct that an inquiry before the magistrate be held. In fact the learned counsel for plaintiff informed the court that the defendant had served a summons on the solicitors and asked the plaintiff to be present at the Magistrate's Court Kuala Nerang on 12 October 2009 to show reasonable cause why the seized goods should not be forfeited *vide* miscellaneous application No. 22/2009 approximately

12 months later. With respect, the court with reluctance is unable to accede to the learned SFC's request as it would be a great injustice to the plaintiff.

Conclusion

[23] Based on the reasons adumbrated above, the court is of the opinion that the defendant has failed to comply with the provisions of s. 128(3) of the Act in that the Director General of Customs has to make a decision whether to release the seized goods or direct such senior officer of customs to refer the matter to the magistrate for his decision. The court agrees that the decision to refer the matter to the magistrate must be made within the one (1) calendar month from the date of receipt of the notice of claimant which has to be served on the defendant within one (1) calendar month from the date of receipt of the notice of seizure by the plaintiff. The upshot is that the plaintiff's application in encl. 1 is allowed with costs.